

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CARL LUTHER GAREL,

Defendant-Appellant.

UNPUBLISHED

June 13, 2006

No. 258962

Kent Circuit Court

LC No. 04-000460-FC

Before: O’Connell, P.J., and Murphy and Wilder, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of three counts of assault with intent to commit great bodily harm less than murder, MCL 750.84; one count each of assault with intent to rob while armed, MCL 750.89; conspiracy to assault with intent to rob while armed, MCL 750.157a; and possession of a firearm during the commission of a felony, MCL 750.227b(1). Defendant appeals as of right. We affirm.

Defendant admitted to police that he and his companion, Jermaine Davis, decided to rob three men, Sixto Hernandez, Gabriel Hernandez, and Hilario Aguilera-Ramirez on December 30, 2003. Defendant told police that as they approached the men, one of them ran and Davis, who was armed with a shotgun, shot at him. Davis then shot twice more into a car in which Sixto and Gabriel hid. Aguilera-Ramirez was injured in the altercation.

Defendant first claims on appeal that his convictions are not supported by sufficient evidence. His argument focuses on his claim that, because he abandoned his criminal intent when he ran from the crime scene at the time of Davis’ second shot and never returned, the evidence was insufficient. We disagree.

Defendant received an abandonment defense instruction for his second and third charges of assault with intent to commit great bodily harm, which charges arose out of the shots fired at Sixto and Gabriel. For that reason, we need only decide whether there is sufficient evidence to sustain those two convictions in light of defendant’s abandonment defense. When reviewing the sufficiency of the evidence to sustain a conviction, we “view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt.” *People v Hunter*, 466 Mich 1, 6; 643 NW2d 218 (2002).

“Abandonment is an affirmative defense, and the burden is on the defendant to establish by a preponderance of the evidence voluntary and complete abandonment of a criminal purpose.” *People v Cross*, 187 Mich App 204, 206; 466 NW2d 368 (1991). Abandonment does not apply to situations in which the defendant fails to follow through with a crime due to unanticipated resistance, complications, or other circumstances that might increase the likelihood of getting caught. *Id.* In this case, defendant ran from the scene after Davis shot Aguilera-Ramirez. A rational trier of fact could conclude that defendant ran because he feared detection after the shots were fired or because he and Davis faced unexpected difficulties during the robbery, and not because he voluntarily abandoned any criminal intent.

In regard to his conspiracy and felony-firearm convictions, defendant also argues that the evidence was insufficient. He argues his act of running from the scene and lack of a weapon supports the inference that he did not intend the commission of any crimes. However, in reviewing the sufficiency of the evidence in a criminal case, all inferences must be drawn in favor of the jury’s verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). The crime of conspiracy is complete upon the formation of the agreement, and a defendant is criminally responsible for the acts of his co-conspirator if those acts are within the scope of the agreement or might fairly have been foreseen to happen as a result of the agreement. *People v Grant*, 455 Mich 221, 236; 565 NW2d 389 (1997). In this case, the evidence demonstrates that defendant and Davis agreed to rob Sixto, Gabriel, and Aguilera-Ramirez at gunpoint. Moreover, the day after the attempted robbery, ammunition matching the shells found at the crime scene was discovered in the glove compartment of defendant’s car. A sawed-off shotgun of the same caliber used in the shooting was also found in the car. Defendant and Davis were in defendant’s car when they decided to commit the robbery and when they were detained by police the day after the failed robbery. A rational trier of fact could infer, based on the testimony and evidence, that defendant provided Davis with the ammunition used at the crime scene. Having provided Davis with the ammunition, defendant should have foreseen Davis using the gun in the robbery attempt. Thus, defendant’s arguments on appeal fail when the evidence and inferences are viewed in a light favorable to the prosecution.

Defendant also argues on appeal that his mere knowledge that Davis possessed a gun is not sufficient to support the felony-firearm conviction. A prosecutor may not merely demonstrate that the defendant aided the commission of the crime; rather, he must demonstrate that defendant aided the commission of the felony-firearm. *People v Moore*, 470 Mich 56, 70; 679 NW2d 41 (2004). A defendant is guilty of felony-firearm under an aiding and abetting theory “if the defendant has procured, counseled, aided, or abetted another person in the carrying or possession of a firearm during the commission or attempted commission of a felony.” *People v Bulls*, 262 Mich App 618, 627; 687 NW2d 159 (2004). In this case, defendant admitted that he and Davis agreed to rob three men, and they approached the men with Davis holding a shotgun. We find it implausible that defendant would have approached the men to rob them while unarmed and outnumbered. Under the circumstances, the jury had sufficient evidence to infer that defendant encouraged Davis to bring the shotgun along to facilitate the robbery knowing that it would be used to intimidate the men into surrendering their valuables. *Moore, supra* at 70-71.

Defendant next claims on appeal that the trial court improperly instructed the jury because it failed to make clear that the preponderance standard, which applied to the abandonment defense, was a less stringent standard than the reasonable doubt standard, which

applied to the elements of the crime. We disagree. We review unpreserved claims of instructional error for plain error affecting defendant's substantial rights. *People v Knapp*, 244 Mich App 361, 375; 624 NW2d 227 (2001). The trial court instructed the jury that "[i]f the evidence supporting the defense of abandonment outweighs the evidence against it, then you must find the defendant not guilty" Accordingly, the trial court properly instructed the jury on defendant's burden of proof in regard to the abandonment defense. The trial court also properly instructed the jury on the reasonable doubt standard placed on the prosecutor. See *People v Cooper*, 236 Mich App 643, 656; 601 NW2d 409 (1999) (holding that CJI2d 3.2, the reasonable doubt instruction used by the trial court in the present case, constitutes an adequate reasonable doubt instruction). Because the trial court properly instructed the jury on the reasonable doubt standard and on the preponderance standard, defendant fails to demonstrate any plain error affecting his substantial rights.

Defendant next claims that he received ineffective assistance of counsel during the course of the trial. We disagree. Because defendant did not raise the issue in the trial court or seek a *Ginther*¹ hearing, we limit our review of defendant's claims to mistakes apparent on the record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

To establish a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense. In order to demonstrate that counsel's performance was deficient, the defendant must show that it fell below an objective standard of reasonableness under prevailing professional norms. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. [*Id.* at 140, citations omitted.]

Defendant first argues that his trial counsel was ineffective for failing to request an abandonment defense instruction for all counts charged. We disagree. The trial court stated on the record that if defendant wanted an abandonment instruction on all counts, it would allow the prosecutor to introduce evidence of a subsequent robbery. Trial counsel subsequently agreed with the trial court that defendant was not entitled to an abandonment defense instruction for all counts charged. Under the circumstances, the decision of trial counsel constituted sound trial strategy because it kept the jury from hearing evidence that defendant was involved in a robbery the day after committing the crimes in this case.

Second, defendant argues that his trial counsel was ineffective for failing to object to the abandonment defense instruction as given. However, because the trial court properly instructed the jury on the abandonment defense, any objection would have been futile. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998). Defendant also argues that trial counsel was ineffective for failing to request an instruction about how the jury should handle the abandonment defense as to all counts. However, the trial court instructed the jury that each count was a separate crime that required separate, independent consideration, so defendant fails to demonstrate any error in this regard.

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Third, defendant argues that his trial counsel was ineffective for failing to object to the admission of defendant's confession. Defendant asserts that there was a reasonable likelihood that his confession would have been suppressed if his trial counsel had objected. Defendant has not, however, explained or supported his position, so he has abandoned this issue. *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004).

Defendant also claims on appeal that his sentences were excessive and violate his federal and state constitutional protections against cruel and unusual punishment. We disagree. Defendant does not dispute that his sentences fall within the recommended sentences under the legislative guidelines range. A sentence falling within the guidelines ranges is presumptively proportionate and does not constitute cruel and unusual punishment, *People v Babcock*, 469 Mich 247, 263-264; 666 NW2d 231 (2003); *People v Drohan*, 264 Mich App 77, 91-92; 689 NW2d 750 (2004). Defendant fails to present any persuasive justification for holding that a sentence of eighteen to fifty years in prison, consecutive to two years imprisonment for felony-firearm, was disproportionate or cruel and unusual considering this violent crime and this repeatedly violent offender. Defendant also claims that, pursuant to *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), Michigan's sentencing scheme violates his sixth amendment right to jury. Our Supreme Court has ruled to the contrary that *Blakely* does not affect Michigan's sentencing scheme because Michigan employs indeterminate sentencing. *People v Claypool*, 470 Mich 715, 730-731 n 14; 684 NW2d 278 (2004).

Affirmed.

/s/ Peter D. O'Connell

/s/ William B. Murphy

/s/ Kurtis T. Wilder